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Nicholas Dylan Ray

***Arab Islamic Banking and the Renewal of Islamic Law***

*(Graham & Trotman, London, U.K.)*

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Originally a Ph.D. dissertation completed under the supervision of Professor Andrew Hess of Boston's Fletcher School of Law and Diplomacy, the book under review was published as part of the Arab and Islamic Law Series under the General Editorship of Dr. Mark Hoyle. Although the author has explained the choice of his title, which is confined basically to a study of Islamic banking of the Arab Middle East, that point of information could have been conveyed somewhat differently perhaps than what the author has done. The author's choice of words "Arab Islamic Banking" in the title is questionable. For the title invokes the question whether Islamic banking as a phenomenon is divisible into its Arab and non-Arab varieties, and the answer to this is clearly in the negative. None of the Islamic banks in the Arab world which the author has reviewed and discussed have identified themselves by the epithet "Arab", and there is, I am sure the author would agree, not enough basis for a distinction of Islamic banking into such categories. Islam itself is not divisible in that way, nor is the Sharia, nor *fiqh* for that matter. No one has, to the best of my knowledge, attempted to distinguish Arab Islamic banking from Islamic banking in other parts of the Muslim world. A preferable rendering of the title that Ray has chosen could be "Islamic banking in the Arab Middle East". The author has excluded Pakistan, Iran and Malaysia from the scope of his study for reasons which are less than convincing. Pakistan's experience of Islamic banking has been criticised as one that leaves "the interest-based banking system virtually unchanged but covering it with an Islamic varnish", (p. 3). Ray goes on to comment that "this hypocracy has led the few Western bankers who know of Islamic banking to see it as a mere semantic sacralization of normal banking, and to discount its originality and importance". ( *ibid*) Rather a harsh assessment, one might say, and one which Ray has failed to support with evidence. Western bankers are shown somehow as the standard bearers of authentic Islamic banking. If Ray chooses to be so outspoken in his critique, then one might also expect

that he should elaborate and specify the substance of his criticism, which he has not done. Ray just tells us then that "Pakistan is omitted from further discussion. Iran also has a state-sponsored Islamic economic system, but its analysis falls outside the pale of this research". (p. 4, fn. 8) And then with reference to Malaysia Ray has this to say "There are a few other Islamic banks not affiliated with Arab Islamic banking such as the ones in Malaysia (Bank Berhad)". (Id.) The reasons Ray has given for excluding Islamic banking in these three countries are somewhat peremptory and dismissive. Be that as it may. The name: Bank Islam Malaysia Berhad is erroneously rendered as "Bank Berhad" and a mistaken impression is also conveyed as if there are "a few such banks in Malaysia" (*ibid*) BIMB is, in fact, the only Islamic Bank in Malaysia which has, however, numerous branches throughout the country.

Ray has explained the purpose of his undertaking in saying that the existing works on Islamic banking tend to either focus on the Islamic law of contract and transactions, *mu'amalat,* or on modern Islamic economics, neither of which provide a synthesised analysis of the *fiqh* principles with the applied aspects of Islamic banking. This book seeks to combine those influences, and he has, much to his credit, gone a long way to deliver what he planned to do. Ray also makes a valid point that the existing literature does not "present a detailed financial analysis of an Islamic bank in comparison with other competing banks" in the convential banking sector, and this is what he intended to provide. The existing literature on Islamic banking is admittedly preoccupied with the juridical and doctrinal aspects of Islamic banking and not so much with the institutional functioning and applied aspects of these banks. But even so, there is a conspicuous absence in Ray's work of any reference in the text or in bibliography to some of the well-known works on Islamic banking such as Baqir al-Sadi's *Al Bankk al-La-Ribawi*, Nejatullah Siddiqi's *Banking Without Interest*, and Sami Harnoud, *Tatwir al A'mal al-Masrafiyya bima Yattafiq wa'l-Shari'a al-Islamiyya* (also available in English translation). Yet Ray's purpose to include the applied aspects of Islamic banking does not justify the fact that about 100 pages of this relatively small volume has been filled by virtually a reproduction of balance sheets and annual reports of the various banks he has discussed. It is one thing to discuss the main results of the annual reports and provide the necessary documentation for it, and quite another to fill in one hundred pages with charts and tables which burdens the book with technical data of the kind that taxes the reader's concentration and is not likely to appeal to general readership interest. Note, for example, the continuous balance sheets and financial ratios on pages 127 through to 144 on various Egyptian banks, which are then followed by a summary and analysis in just over one page (pp. 145-146). This is in turn followed by another solid bloc of data from page 147 through to 162, and then 165 to 174, and 176 to 180. This is followed by the author's general conclusion on just one page (i.e. p. 180), followed yet again by some seven pages of excerpts from the *fatwas* of the Kuwait Finance House, Faisal Islamic Bank of Egypt and two conference resolutions on *murabaha*, *musharaka* and *ijarah*. The book then ends with a Bibliography and Index. It is thus noted that the actual text of this book occupies only 83 out of 194 pages and the balance is basically quoted matter.

The text in its initial 83 pages is divided into an Introduction that occupies 37 pages followed in chapter two by a discussion of ***Murabaha,*** and ***Musharaka*** and ***Mudaraba.*** These are followed by three other chapters, one on Faisal Islamic Bank of Egypt, in no less than 90 pages, followed by chapter four bearing the title "Aggregate Balance Sheet and Growth Rate of Islamic Banking" in seven pages, and then chapter five, bearing the title "Concluding Remarks", in one page, and even the one page is actually only half a page. As I said earlier the last three chapters are interspersed with occasional summary and comments in the author's own words, but the rest resembles a company report where the author takes for granted the reader's interest and comprehension of the technical data. There is little sense of chapter balance in what we see here between 90 pages in chapter four and only half a page in Chapter V.

In the Introductory Chapter the author reviews the history of Islamic banking, its objectives and organisation, and gives a brief account of transactions such as ***mudaraba***, ***musharaka*** and ***murabaha.*** The author's incisive account of the advantages and disadvantages of Islamic banking as well as the specific areas where problems are encountered is interesting and obviously well-written. This may be said to be a strong point of Ray's writing throughout the work: Identification of problems and a critical assessment of what has been done. Yet the strength that he shows in this regard also makes a certain weakness of his work all the more obvious in that he highlights the problematics of Islamic banking but often fails to suggest any solutions. Yet notwithstanding the dominantly critical feature of his work and its focus on problematics, Ray's overall assessment of the past achievements and future prospects of Islamic banking is very positive, articulate, and convincing.

The last one-third of this 37-page Introduction discusses the history of Islamic law and reviews the broad outline of the sources of Islamic law, the ***usulal-fiqh.*** Ray's references in this part are confined to such writers as Schacht and Coulson and speaks the typical oreintalist slant for which these works are well known. Ray's limited knowledge of this vast area of Islamic scholarship does not warrant the sharply critical tone in which he allows himself to speak. Ray's remark on the Qur'an, for example, that "the Qur'an taken alone is insufficient as a source of law, giving detailed legal prescriptions on only a handful of matters (marriage, divorce, etc.)" (p. 27) is typically superficial and ignorant of the Qur'an. The Qur'an is admittedly concerned, not so much with specific details, but with general principles of law and religion, but that is a dimension of the Qur'anic teaching which makes it characteristically broad and comprehensive not otherwise. And then again, Ray has discussed the ***usulal-fiqh*** in about three pages and what he says here is rather outlandish as it gives somehow the impression as if the ***usulal-fiqh*** is preoccupied with contradictions between the sources. Note for example, the three-point summary on page 27 which Ray has characterised as "the most important contribution" of the legal theory of ***usulal-fiqh*** concerning "traditions" and all the three points are in one way or another concerned with contradictions between the Qur'an and Sunna. Then on the next page Ray writes"... due to the myriad traditions, many of which are in some way contradictory..." (p. 28). The ***usulal-fiqh*** admittedly comprises in its scope themes such as abrogation (***al-naskh***) and conifict of evidences (***ta'arud al-adilla***), topics which are too articulate and

complex to be reduced to the level of platitudes that occupies the space on pages 27-28. Moreover, abrogation and conflict of evidences are both marginal themes and rather remote to the main concerns of ***usulal-fiqh***(1). And then Ray's characterisation of *ijma*' that "consensus must be historical, that is, it can only be perceived years after it has occurred" (p.28) is inaccurate as the definition of *ijma* does not support it. *Ijma* can indeed be concluded over a period of time or on an instantaneous basis. A great deal of what we have known of the *ijma* of the Companions has, in fact, occurred on this latter basis.

Ray is also mistaken in his remarks on futures trading where he wrote: "As for commodities futures (with the exception of gold and silver), the *Hanafi, Shafi'i* and *Hanbali* schools would seem to permit them (on the basis of *bay'al-salam* or *bay al-mu'ajjal*)" (p.30). A closer examination of commodity futures will show that we cannot subsume futures trading in commodities under either *salam* or *bay' al-mu'ajjal* or indeed under the rulings of the *madhahib* in the way Ray has made out. This is simply because in futures trading, both of the countervalues, that is, the payment of price, and delivery of the subject matter are postponed to a future date, whereas this is not the case in either *salam* or *bay' al-mu'ajjal*. The former involves deferment only of the delivery of the subject matter of sale but the price is paid at the time of contract, whereas the latter involves deferment only of the price, with the delivery being completed as of the time of contract. Moreover, futures trading are much more complex and several other aspects of the operational features of futures, such as the fact that most of the sales and purchases are off-set through reverse transactions prior to delivery and payment – present problems which cannot be addressed within the rubric of *salam* and *bay' al-mu'ajjal* but need separate analysis and *ijtihad* beyond all these(2).

In his comments on *gharar* Ray has specified four types of *gharar*, the third of which concerns "a sale where the price is not exactly specified", as in the phrase "at today's price" or "at the market price". (p. 30). The relevant footnote then reads that "these examples would generally be forbidden by all four schools". This is once again inaccurate as the Hanbali *fiqh* validates both of these, that is, sale at "today's price", or "at market price".

Ray has once again erroneously stated concerning *salam* that "it abrogates the principle requiring the object to be existent and present at the sale". (p.32). The correct reading would be that both *salam* and *istisna* represent exceptions to that principle, and the exception is based on the people's need for them. The correct principle that is invoked here is *takhsis al-'am* (specification of the general by way of making an exception *istithna'*) rather than abrogation as such. *Salam*, in other word, does not abrogate anything but has itself been validated on an exceptional basis. There is even a weakness in this explanation as, according to Ibn Qayyim al-jawziyya, *salam* is

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(1 ) A chapter on abrogation and one on conflict of evidences can be found in **M.H Kamali**, *Principles of Islamic Jurisprudence*, Cambridge: The Islamic Texts Society, 1991 pp. 149-l68 and 356-366 respectively.

(2 ) See for a discussion see **M.H. Kamali**, "Islamic Commercial Law: An Analysis of Futures" *The American Journal of Islamic Social Sciences*, Vol. **13**, November 2, Summer 1996, pp. 197-224.

validated normally, that is, not by way of exception. *Salam* is validated by the textual authority of a *hadith* in which there is no reference at all to the notions of exception, specification or abrogation, and this has enabled Ibn Qayyim to say that the *hadith* of *salam* conveys a normal rather than an exceptional ruling of Sharia.

Chapter two, which constitutes central theme and subject matter of the book under review provides a competent, well-researched and informative presentation of the three principal modes of financing in Islamic banks. The chapter begins with a resume of the general principles of Islamic law on the contract of sale, which is then followed by a detailed discussion of cost plus profit sale, its application, and in some cases also misapplications, in Islamic banking. Some of the distortions of *murabaha* that Ray has highlighted in the practice, for example, of the Kuwait Finance House, including the one which transfers almost all liability for damage and defect to the buyer, are clearly indefensible, and Ray is duly critical of such abuses. Yet I have some reservation over Ray's somewhat undivided concern and advocacy of medieval *fiqh* which Ray has seen as the hallmark of validity and the only valid framework for the understanding of Sharia and *ijtihad*. One of the recurrent themes of *murabaha* that Ray has discussed in several places is whether the promise to buy should at all bind the promisor in *murabaha*. The answer to this question that is given by the *fiqh* schools, except that of the Maliki, is that such a promise is not binding. Ray has taken this as his main evidence to launch a frontal attack on some of the recent *fatwas*, which seek to attach legal force to the buyer's promise in *murabaha*. In all of this Ray has nowhere referred to, nor even acknowledged, the Quranic *ayat* and what they have to say on the fulfillment of promises. This is where the imbalance of Ray's analysis becomes evident in that all he tells us is what this school or that school has said over the subject of promises, but makes no reference either to the Qur'an or Sunna (See p.50-54). For a quick perusal of the Qur'anic *ayat* on this subject should be enough for Ray to find out that the Qur'anic text on this subject (al-Isra', 17-34; al-Baqara, 2:177; al-Mu'minun, 23:8; al-Ma'arij, 70:32) is equally open to the idea of a binding promise.

Ray's discussion of the contract of Partnership (*musharaka*), like that of *murabaha*, expounds the medieval *musharaka*, or the *fiqh* expositions of this contract, modern *musharaka* as practiced in the Islamic banks, dissolution of *musharaka* and its consequences, and then self-dissolving *musharaka* or *musharaka mutanaqisa*. Some of the problematics of *musharaka* that Ray has discussed relate to the combinations of this contract with lease and sale that involve one of the participants of *musharaka*, and there are *fatwas* that some of the Islamic banks have issued on this. Ray has given a readable account of the various aspects of *musharaka* but his work is basically descriptive and analytical without attempting to suggest any new solutions to the issues he has raised.

The rest of chapter two is devoted to *mudaraba*, which begins with an exposition of medieval *mudaraba*, then modern *mudaraba* or the variations of *mudaraba* that are now practiced by the Islamic banks, conduct of *mudaraba*, and its dissolution. Once again, Ray's treatment of this subject is interesting and insightful, there being no question over the engaging style of his writing. Having said this, however, I find Ray's

preoccupation with the medieval *fiqh* a little overwhelming. This is his recurrent theme and he reverts to it once again as follows:

> Taking medieval fiqh as the only effective adjudicator of Islamicity, and recognising that it has been chosen as the primary basis for the legitimacy of Islamic banking, the process of formulating modern Islamic banking *fatwas* must not bypass medieval *fiqh* (p. 82).

And then again on the same page Ray speaks critically of

> "…intellectually superficial arguments which blithely ignore any conflicts with *fiqh* the very essence of Islamic law is compromised and the "Islamic" nature of Islamic banking becomes merely semantic". (p. 82)

This undivided emphasis on medievalism is clearly misplaced as what we read in Ray amounts to undiluted imitation (*taqlid*) of the authority of the past in almost total oblivion of the objectives of the Sharia such as *maslaha* and justice. In doing so, Ray confuses the Sharia with *fiqh*. The Sharia is grounded in the divine revelation whereas *fiqh* is a human edifice, a commentary if you like, on the Sharia. To confuse the one for the other has precisely been the bane of *taqlid* and I need not elaborate that the Muslim community's return to *ijtihad,* following the strictures of the era of *taqlid* is to *ijtihad* which draws its primary inspiration, not from medieval *fiqh*, but directly from the Qur'an and Sunna, and the overriding values that are upheld in these sources.

As I noted earlier chapter three is devoted to a case study of the Faysal Islamic Bank of Egypt where the author provides valuable insight into the FIBE experience ever since its inception in 1979 through 1990. Ray has himself clearly conveyed the remarkable success story of FIBE despite the many adverse conditions that were faced by the Egyptian economy during this decade, including, for example, the drastic devaluation of the Egyptian pound against major currencies, especially the US dollar, by about 380 per cent within a decade. To survive at all under such adversities is no mean achievement but to record impressive growth and outstanding results which have outshone all the other commercial banks of Egypt during the period under observation is nothing less than inspiration and an astounding success story for Islamic banking.

Ray is very positive in his overall assessment of Islamic banking especially of the effort that it has taken to turn Islamic banking into a "model of rational and dynamic compromise between modernity and fundamental Islamic cultural values .." (p. 181).

Notwithstanding the many weaknesses that I have referred to and discussed, chapter two, which is the central feature of this book, is well-written and provides a welcome addition to the now fast growing literature on Islamic banking. The author's analytical approach to complex issues and the insight that he conveys as well as the concise style of his writing are among the strong features of his work. All in all, the book presents the reader with a mixed picture containing chapters of variable qualities: of the five chapters that the book contains chapter two makes a positive contribution to the understanding of the problematics of Islamic banking. The main weaknesses of the

author's work in this, as well as in the introductory chapter, are manifested in shallowness of contact with the primary sources of Sharia, passing of judgments on matters over which the author has not shown a firm grasp of the available evidence, excessive advocacy of medievalism and criticising others for failure to comply with questionable propositions. I have also made critical remarks about the format and size of certain chapters and the author's excessive reliance on quoted material. Yet I am aware that the book addresses new issues in an area of Islamic law, which is still in the early stages of its development. To engage in some measure of speculative analysis over issues on which no consensus has yet materialised may be inevitable, and the author should be congratulated for his forthright approach in addressing such issues.

I hope that my critical observations in this review will be seen as a positive contribution to a future edition of this book. Dr. Dylan Ray might like to follow up developments in Islamic banking in the 1990's in areas which he has already included in his present work, or better still, to widen the scope of his enquiry beyond the Arab Middle East and include developments in such places as Malaysia, Iran and Pakistan.